

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

MICHAEL ELLIOTT,	)	Case No.:
	)	
Plaintiffs,	)	COMPLAINT FOR DAMAGES
	)	AND DEMAND FOR JURY TRIAL
v.	)	
	)	
BNSF RAILWAY COMPANY, a	)	
Delaware corporation,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

Comes now Plaintiff Michael Elliott, by and through his undersigned counsel, and for his causes of action against the above-named Defendant BNSF Railway Company, states as follows.

**Nature of Action**

1. This is an action by Plaintiff against Defendant to recover damages and for other relief under the whistleblower provision of the Federal Rail Safety Act, 49 U.S.C. §20109. Plaintiff alleges retaliation in the form of harassment, intimidation, termination of employment,

1  
2 and other discriminatory and illegal acts by Defendant, culminating on March 3, 2011, and  
3 having continued in numerous ways over several years.

4 2. On August 27, 2011, Plaintiff timely filed an administrative claim under 49  
5 U.S.C. §20109 with the Occupational Safety and Health Administration's ("OSHA") Region 10  
6 office in Seattle, Washington. More than 210 days having elapsed with no final decision, and  
7 Plaintiff therefore exercises his right to file an original action *de novo* pursuant to 49 U.S.C. §  
8 20109(d)(3).

### 9 **Parties**

10 3. At all times material hereto, Plaintiff was a Washington resident employed by  
11 Defendant BNSF Railway Company, and working in its metropolitan Tacoma-Seattle operations.

12 4. At all times material hereto, BNSF Railway Company was a rail carrier engaged  
13 in interstate commerce. BNSF operates in 28 states including Washington, employs  
14 approximately 40,000 people, and is one of the nation's largest rail carriers. BNSF maintains its  
15 corporate headquarters in Fort Worth, Texas.

### 16 **Jurisdiction and Venue**

17 5. This Court has jurisdiction pursuant to 28 U.S.C. §1331 and 49 U.S.C. §20109.

18 6. Venue is proper pursuant to 28 U.S.C. §1391 because Defendant does business  
19 here and the events complained of occurred in and around the city of Tacoma. Plaintiff maintains  
20 residence in western Washington.

21 7. Plaintiff timely filed an administrative claim under 49 U.S.C. §20109 with the  
22 Occupational Safety and Health Administration's ("OSHA") Region 10 office in Seattle,  
23 Washington. OSHA did not issue a final decision within 210 days after the filing of the FRSA  
24 complaint, and said delay was in no manner due to any bad faith on the part of Plaintiff.

**Statement of Operative Facts**

8. Plaintiff, Mr. Elliott, had been employed by BNSF since January 1, 1995 and primarily worked as a Locomotive Engineer and/or Conductor since that time. Mr. Elliott has held union officer positions with the Brotherhood of Locomotive Engineers and Trainmen (BLET) as Legislative Representative, 1<sup>st</sup> Vice-Chairman, Washington State Legislative Board member, and as Chairman of the Washington State Legislative Board. Mr. Elliott held office as Chairman of the BLET Washington State Legislative Board (WSLB) representing the interests of over 750 Locomotive Engineers and Trainmen, working on four railroads (BNSF, Union Pacific, AMTRAK, and Tacoma Rail) across Washington State when the violations occurred. As Chairman, Mr. Elliott's duties include safety and health, and legislative affairs. Additionally, Mr. Elliott held union office as Vice President and as President of BLET Local Division 238 (BNSF), in Tacoma, WA.

9. In his capacity as 1<sup>st</sup> Vice Chairman and as Chairman of the BLET-WSLB, Mr. Elliott focused on workplace safety issues, membership concerns regarding safety and health in the workplace, regulatory violations in the workplace, and state-level legislative affairs related to the same. Mr. Elliott has worked closely with the BLET-WSLB Board, his BLET union membership, and other unions in identifying and reporting safety issues, safety concerns, health concerns, and/or potential safety violations. Mr. Elliott's reporting of such safety issues and concerns, health concerns and safety violations included his reporting of such concerns to the various railroads as well as to the Federal Railroad Administration (FRA), the Federal agency responsible for monitoring and regulating the railroad industry, including the BNSF Railway Company.

1  
2 10. Over the course of several months during 2010, Mr. Elliott reported a number of  
3 potential signal-related safety violations to BNSF Manager Robert Raglin, specifically  
4 overgrown vegetation blocking the view of signal aspects and Signal System malfunctions. The  
5 geographical territory where these workplace safety issues occurred, including the area where the  
6 overgrown vegetation and Signal System malfunctions were problematic, was the responsibility  
7 of BNSF Official, Road Foreman of Engines, Dennis Kautzmann.

8 11. Upon information and belief, in response to Mr. Elliott's complaints, Mr. Raglin  
9 contacted Mr. Kautzmann to discuss the overgrown vegetation and Signal System malfunctions  
10 on his territory. Mr. Kautzmann denied any issues with overgrown vegetation or Signal System  
11 malfunctions in his territory.

12 12. On January 14, 2011, due to no response by BNSF, Mr. Elliott reported his safety  
13 concerns detailed above to the Federal Railroad Administration (FRA) by email. The safety  
14 concerns involved Signal Systems, Signal Visibility (vegetation), and Train Crew/Dispatcher  
15 Communications. Mr. Elliott also raised safety concerns about BNSF dispatcher workloads and  
16 staffing levels. Again, the area where most of the safety concerns were extent was the territorial  
17 responsibility of Mr. Kautzmann.

18 13. In correspondence dated March 28, 2011, the FRA responded to Mr. Elliott's  
19 concerns and represented that after investigation by a team of inspectors, the following safety  
20 violations were found:

21 A) 245 track, switch and turnout defects were found and reported to BNSF for corrective  
22 action with many of the defects related to improperly adjusted switches;  
23  
24

1  
2 B) Track inspections also revealed a few areas in which trees were leaning into the right-of-  
3 way to the extent they were brushing against rolling stock (signal visibility was not affected);  
4 and

5 C) 112 signal system defects were identified and reported to BNSF for correction; therefore,

6 D) Civil penalties recommended against BNSF for various track and signal system safety  
7 defects also included arrangements for a vegetation contractor to initiate a vegetation control  
8 process in various areas of concern.

9 14. As a result of its investigation, the FRA found hundreds of violations by BNSF,  
10 with many of the violations occurring on territory which falls under the responsibility of Mr.  
11 Kautzmann. These violations subjected BNSF to monetary fines.

12 15. Prior to the conclusion of the FRA investigation, on March 3, 2011, and in  
13 response to Mr. Elliott's protected activity of reporting safety violations in the workplace, Mr.  
14 Kautzmann harassed, antagonized, and provoked Mr. Elliott after he had completed his work  
15 assignment for the day. At the time Mr. Elliott was "off-duty" under the protected Federal Hours  
16 of Service rest requirements, and was attempting to depart for home.

17 16. Ignoring Mr. Elliott's request to be left alone as he was off duty, Mr. Kautzmann  
18 followed Mr. Elliott outside into the parking lot, thereby provoking him by jumping onto the  
19 hood of Mr. Elliott's car while Mr. Elliott was driving his vehicle to exit the parking lot, and then  
20 later alleging to local police that a physical assault had occurred.

21 17. In retaliation against Mr. Elliott for engaging in protected activities, BNSF on  
22 March 10, 2011, falsely charged Mr. Elliott for allegedly failing to report an off the job  
23 occurrence relating to his licensure as a locomotive engineer. Citing the false charges as a  
24 pretext, BNSF terminated Mr. Elliott's employment of 16 years on April 25, 2011.

1  
2 18. After firing Mr. Elliott on April 25, 2011, BNSF then subjected Mr. Elliott to  
3 another hearing over the alleged assault involving Mr. Kautzmann. Following that, BNSF then  
4 fired Mr. Elliott for a second time on September 28, 2011.

5 **Cause of Action**

6 19. That Plaintiff repeats and incorporates by reference herein all the foregoing  
7 paragraphs as if fully set forth.

8 20. The Federal Railroad Safety Act, in 49 U.S.C. § 20109(a)(1) and its implementing  
9 regulations at 29 CFR § 1982 *et seq.*, states that a railroad engaged in interstate commerce may  
10 not discharge, demote, suspend, reprimand, or in any other way discriminate against an  
11 employee who provides information to any Federal, State or local regulatory agency which the  
12 employee reasonably believes constitutes a violation of any Federal law, rule, or regulation  
13 relating to railroad safety.

14 21. The Federal Railroad Safety Act, in 49 U.S.C. § 20109(b) and its implementing  
15 regulations at 29 CFR § 1982 *et seq.*, states that a railroad engaged in interstate commerce shall  
16 not discharge, demote, suspend, reprimand, or in any other way discriminate against an  
17 employee for reporting, in good faith, a hazardous safety or security condition.

18 22. BNSF knew that Mr. Elliot engaged in the protected activities as defined in 49  
19 U.S.C. § 20109(a)(1) and § 20109(b).

20 23. BNSF retaliated against Mr. Elliott and subjected him to adverse actions  
21 subsequent to him engaging in the protected activities as defined in 49 U.S.C. § 20109(a)(1) and  
22 § 20109(b). Specifically, Mr. Elliott was terminated on April 25<sup>th</sup>, 2011.

24. Mr. Elliott's engaging in the protected activities as defined in 49 U.S.C. § 20109(a)(1) and § 20109(b) was a contributing factor to the adverse actions lodged against Mr. Elliott.

**Prayer for Relief**

25. For these wrongs, Plaintiff requests all compensation and other relief, including declaratory relief, allowable at law for the harms inflicted upon him, as well as costs, attorney fees, and any other relief, in an amount greater than \$100,000.

26. Plaintiff specifically requests a judgment under 49 U.S.C. §20109 for all relief appropriate under the circumstances, including but not limited to (a) compensatory damages including compensation for any special damages; (b) litigation costs including expert witness fees and reasonable attorney fees; and (c) punitive damages.

WHEREFORE, in order to encourage employees to freely report safety concerns and violations of federal safety laws and regulations, thereby assuring that the Federal Railroad Administration has the necessary information to develop and administer an effective rail safety regulatory program that promotes safety in every area of our nation's railroad operations, the plaintiff demands judgment under the FRSA for all relief necessary to make him whole, including but not limited to:

1. Expungement of all references to disciplinary action related to this matter;
2. Lost benefits with interest;
3. Lost wages with interest;
4. Compensatory damages for economic losses due to defendant's conduct;
5. Compensatory damages for mental anguish and emotional distress due to defendant's conduct;
6. Statutory maximum of punitive damages; and,

7. Special damages for all litigation costs including expert witness fees and attorney fees.

**Jury Demand**

Plaintiff hereby demands a jury of twelve of his peers.

Dated: January 17, 2013

**ROSSI VUCINOVICH PC**

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